SEP 17
HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1955

No. 403

PAUL FREEDMAN,

Petitioner,

vs.

DONOVAN & SCHUENKE, HORACE F. FRENCH, RALPH A. McCLURE and A. E. FRENCH,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing, by a divided vote, an order of the District Court affirming an order of a Referee in Bankruptcy refusing to set aside a sale of property of a bankrupt estate.

Opinion Below.

No written opinion was rendered by the Referee in Bankruptcy. The Referee's Certificate on Review to the District Court discusses, in summary, legal and factual questions presented in the proceedings [R. 4-14].[1] The Referee's Findings of Fact and Conclusions of Law are also contained in the Transcript of Record [R. 53-68]. The order of the District Court [R. 77-78] affirming the order of the Referee was not accompanied by any written opinion. The opinion of the Court of Appeals is unreported and is appended hereto as Appendix "A." The opinion and order of the Court of Appeals upon petition for rehearing is also unreported and is appended hereto as Appendix "C."

Jurisdiction.

The judgment of the Court of Appeals was entered May 10, 1955 [R. 205; App. "B"]. Rehearing was denied on June 21, 1955 [R. 206-207; App. "C"]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1), and 11 U. S. C., Section 47(c).

Questions Presented.

1. Whether the Court of Appeals erred in holding that under principles of equity applicable in the administration of the Bankruptcy Act the court-approved sale of property from the estate of a corporate bankrupt to a former officer of the corporation is void despite the undisturbed concurrent findings of the Referee in Bankruptcy

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[1]The reference is to the Transcript of Record as certified by the Clerk of the Court of Appeals below.

and the District Court that the sale was at the highest and best bid obtainable; that the purchaser obtained from his bid no secret profit, but rather a loss; that there was no conspiracy between the purchaser and the petitioner to whom the property was resold; that the purchaser was neither an employee, representative, partner or front for the Trustee or Referee in Bankruptcy, but had only performed some inconsequential acts of rent collecting and maintenance overseeing merely to preserve the bankrupt's estate; and that the bid and purchase was made only after full disclosure to, and knowledge by, all persons concerned of all the relevant premises under which the purchaser offered his bid.

2. Whether the Court of Appeals erred in holding that the respondents were privileged to avoid the court-approved sale in long delayed proceedings, with consequent disturbance of land titles, without compliance with and in circumvention of the review provisions of the Bankruptcy Act (11 U. S. C., Sec. 67(c)), and free from all equitable defenses limiting the right of respondents to avoid the aforesaid contract of sale of real property.

3. Whether the decision and judgment of the Court of Appeals holding that the court-approved sale from the bankrupt estate herein must be invalidated and recalled regardless of the passage of time and the creation of bona fide intervening rights contravene the fundamental policy of the Bankruptcy Act in the administration and sale of bankrupt estates and deprive petitioner of his property without due process of law.

Statutes Involved.

The pertinent provisions of 18 U. S. C., Section 154 (June 25, 1948, Ch. 645, Sec. 1, 62 Stat. 690) involved herein are as follows:

> "Whoever knowingly acts as a referee in a case in which he is directly or indirectly interested; or
>
> Whoever, being a referee, receiver, custodian, trustee, marshal, or other officer of the Court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a bankruptcy proceeding;
>
> * * * * * * * *
>
> Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant."

The provisions of 11 U. S. C., Section 67(c) (June 22, 1938, Ch. 575, Sec. 1, 52 Stat. 858) are as follows:

> "A person aggrieved by an order of referee may, within ten days after the entry thereof, or within such extended time as the Court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the Court upon such terms as will protect the rights of all parties in interest."

Statement of the Case.

In May, 1947, the Ridgecrest Development Co., a corporation, was adjudged a bankrupt [R. 2], and the proceedings referred to a Referee in Bankruptcy by order of the District Court [R. 2-3]. The Trustee in Bankruptcy was elected by the creditors in June, 1947 [R. 54]. The assets of the bankrupt estate consisted principally of a tract of partly improved land, located at Ridgecrest, in Kern County, California, approximately 160 miles from Los Angeles, California [R. 54].

Following several attempts by the Trustee to make a sale of the assets of the bankrupt estate [R. 55], a sale of the property was finally made on January 13, 1950 to D. J. Miller, a former officer of the bankrupt corporation for the sum of $131,000.00 [R. 57]. The Order confirming the sale was made on January 16, 1950 [R. 9]. No petition for review was ever filed from this Order Confirming Sale [R. 9].

Some nine months after the confirmation of the sale, on September 17, 1950 [R. 25], respondents filed with the Referee in Bankruptcy a "Petition to Set Aside Sale of Property to D. J. Miller, for Equitable Relief: And for an Order to Show Cause and Restraining Order" [R. 15]. The respondents Donovan and Schuenke alleged that they were creditors of the estate having a provable claim of $1,009.12; the claim of respondent Ralph A. McClure was in the sum of $43.00; the claim of respondent Horace F. French was in the sum of $116.00; and the claim of respondent A. E. French in the

sum of $31.65 [R. 15].[2] The substance of the charges contained in the Petition was that the sale by the Trustee to D. J. Miller was in violation of the provisions of 18 U. S. C., Section 154, and upon information and belief that Miller and other officers of the bankrupt corporation had conspired to prevent the sale of the property and assets of the estate to anyone other than themselves, that the purchase was made with the knowledge of the petitioner herein who had agreed to purchase the property from Miller and his associates at a higher price and thus enable the latter to make a secret profit [R. 15-25]. The Trustee in Bankruptcy made answer to the Petition [R. 25-52], putting the principal allegations of the Petition in issue. The matter then came on for hearing before the Referee in Bankruptcy, and extensive hearings were held and evidence taken [R. 81-183].

The Referee made detailed Findings of Fact and Conclusions of Law [R. 53-68]. These findings were adopted *in toto* by the District Court [R. 77-78]. They were left undisturbed by the Court of Appeals below (App. "A," p. 6).

The Referee found among other things as follows: The consideration passing to the estate was adequate and was to the highest and best bid which the trustee received for the assets and that the sale on January 13, 1950 to Miller was the highest and best obtainable [R. 62]; that the respondents stood by and took no action for many months after the completion of the sale and "until the close of escrow on August 1, 1950, with the expectation

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[2]The Referee found that the allowed claims were less than the amounts so alleged [R. 54].

that the said D. J. Miller could not conclude the sale and that there would be a forfeiture of the cash paid into escrow of approximately $50,000" [R. 62]; that Miller and his associates did not receive from petitioner Freedman any value or consideration over the initial sale price of $131,000.00, and "they individually or collectively did not receive any profit on the said resale to Paul Freedman" [R. 63]; that petitioner Freedman gave full value for the assets of the estate upon acquiring them by resale from Miller; that petitioner Freedman was dealing honestly and in good faith; that petitioner had not received any secret or other profit on the transaction to which the creditors or trustees were entitled; that it would be "impossible for the Referee to set aside the sale to him (Miller) and restore to him the consideration, cash and properties as paid by him"; and that it would not be in the best interests of the creditors to set aside the sale [R. 64].

The Referee further found that for about two months in 1949, an order had been made by the Referee appointing Miller as agent and representative of the trustee for the purpose of subdividing, leasing and/or selling the real property of the bankrupt estate upon the assumption that Miller could arrange for a subdivision program which would be beneficial to the creditors, but that the project was never concluded [R. 64]; that the aforesaid order of September 9, 1949, was set aside at the request of the Trustee on November 2, 1949, by a new order which provided that Miller could only act with respect to the estate upon written instructions from the Trustee, but "no such written instructions were given to the said D. J. Miller, other than instructions in re collection of rentals from tenants at Ridgecrest, Kern County, California by

the said D. J. Miller for the trustee" [R. 65]; that the sale of January 13, 1950, was widely advertised by the Trustee [R. 56]; that the sale was attended by a large number of the creditors including the respondents [R. 56]; that Miller inquired of the Referee as to whether he could be the purchaser of the said estate if his bid was the highest and best bid, and he was informed that he could so be the purchaser [R. 57]; that at the conclusion of the bidding counsel for respondents made a motion for a continuance of the sale which was opposed by all the creditors [R. 57]; that no representation was made by anyone that the bid would provide full payment to creditors, nor was there any evidence that any creditor, or anyone else, would have made any higher bid had they believed that the amount of the bid would not be sufficient to pay in full all claims [R. 59].

The Referee further found that the respondents introduced no evidence to support their charges of conspiracy, and found that Miller and his associates had not entered into any such conspiracy to prevent a sale of the property to anyone other than themselves [R. 66]; that Miller had not prevented any other person from making a bid upon said property [R. 66]; that petitioner Freedman had not conspired with Miller and his associates in any manner, and specifically had not conspired to enable Miller, or anyone else to make a profit upon resale to petitioner Freedman [R. 66-67].

The order of the Referee in Bankruptcy dismissing the Petition was entered December 26, 1950 [R. 68]. A

Petition for Review was filed by respondents on January 8, 1951 [R. 69-76]. The Referee's Certificate on Review to the District Court [R. 4-14] was filed November 19, 1951 [R. 14]. The Certificate realleges in summary the Findings of Fact and Conclusions of Law [R. 7-9]; sets forth the studied delays and laches attributable to respondents [R. 9-10]; points out that there was no violation of 18 U. S. C., Section 154, in that the sale was not to the Trustee [R. 10]; that Miller's inconsequential activities in connection with the estate [R. 10-13] "did not place him in the class of forbidden purchasers" [R. 10]; that all the facts were known by all parties concerned at the time of the sale, and no objection was made at the sale to the status of Miller as a buyer [R. 10-11]; that "Miller did not make any profit on the transaction; that in fact he suffered a loss of several thousand dollars due to escrow and other charges" [R. 13]; that Miller "merely acted as an intermediary between the trustees and the said purchaser (Freedman); that the sale was held in open court after extensive advertising; that competitive bidding took place at said sale; that no facts were suppressed and no unfair advantage given any person" [R. 13]. The order of the District Court denying the Petition for Review and affirming the Referee's Order Confirming Sale was entered on March 12, 1952 [R. 77-78]. Respondents prosecuted their appeal to the Court of Appeals [R. 79].

On May 10, 1955, more than five years after the sale of the property aforesaid, the Court of Appeals below re-

versed the order of the District Court and held the sale void as a matter of law, Judge Stephens dissenting (App. "A"). On the question as to whether the sale was void because of the alleged conspiracy between Miller and other officers of the bankrupt corporation and the petitioner Freedman, the Court of Appeals replied in the negative (App. "A," p. 6). The findings of the Referee were upheld. On the question as to whether Miller came within the purview of 18 U. S. C., Section 154, the Court declined to pass upon the question (App. "A," p. 7). On the question whether Miller "was a fiduciary and the sale void under the general principles of law" (App. "A," p. 3), a majority of the Court replied in the affirmative. It was held by a majority of the Court that Miller could not receive a transfer of the property because (1) as officer of the bankrupt corporation he was a "fiduciary" (App. "A," p. 10) (2) because his limited services to the Trustee also made him a "fiduciary" (App. "A," p. 7) and (3) that "neither the Referee nor the Trustee could personally have acted in these premises," and what they could not do, they could not authorize Miller to do (App. "A," p. 12). It was held that "a fiduciary cannot deal or receive a transfer of the property which is the subject of the trust"; that "the principle is established by general law and does not depend upon the existence of a statute for enforcement" (App. "A," p. 16). Thus, "even if there were full disclosure, adequacy of consideration, absence of secret profit, an open judicial sale will not avail separately or in combination as a defense for such a fiduciary" (App. "A," p. 15).

Judge Stephens in his dissenting opinion noted that the "irregularities" of which the majority complained "derived from a commendable though perhaps unwise effort to reduce expenses and save creditors from losses"; that the short retention of Miller by the Referee "never met with the approval of the trustee"; that "the attack upon the proceedings was long delayed and should not be successful, with the consequent disturbance of land titles based upon court orders,[3] unless positive fraud was both alleged and proved. These requisites seem to me to be lacking" (App. "A," p. 16).

The petitioner Freedman herein duly and timely filed his petition for rehearing. The petition for rehearing was denied on June 21, 1955 (App. "C"). The opinion and order of the Court premises the denial of rehearing upon the ground that petitioner was found by the Court of Appeals not to have been an innocent purchaser, but an active participant in the bankruptcy sale "which was void of record because of the participation of officers of the Court in conjunction with Paul Freedman in the purported purchase of property in the custody of the Bankruptcy Court" (App. "C," p. 18).

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[3]The real property in fact has been subdivided and sold in individual lots since the sale of January, 1950. Extensive improvements and buildings have been established thereon by a large number of bona fide purchasers. A United States Post Office, a bank and various office buildings have been erected and numerous business establishments now operate.

ARGUMENT.

There are special and important reasons for the allowance of the writ herein. This case presents fundamental questions of importance which loom large in the administration of the Bankruptcy Act. A divided Court has enunciated principles which will render the administration and sale of bankruptcy estates impractical and undependable. The objective of bankruptcy liquidation is to realize the maximum price in order to satisfy the claims of creditors, and this objective patently calls for the widest possible market for the bankrupt's assets. In holding that an officer of a corporate bankrupt is disqualified from purchasing the bankrupt property, although his bid is the highest and most adequate and free from taint of fraud; in holding that all sales to a bankrupt are void if the bankrupt rendered even *de minimus* services to preserve the estate prior to the sale and in holding that the aforesaid circumstances creates in such purchaser a status equivalent to an officer of the Bankruptcy Court, the Court below appears to have effectively undermined the policy of the Bankruptcy Act.

Moreover, the Court below, has, contrary to the policy of the Bankruptcy Act and the law and in disregard of the concurrent findings of the Referee and District Court not only created uncertainty and confusion in the administration of the Act, but it has encouraged litigious and self-seeking persons to bring unfounded and long delayed proceedings free from all equitable defenses, in express violation of the provisions of the Act with resultant

clouds upon the titles to property sold in the past and the discouragement of purchases at bankruptcy sales in the future.

Finally, in holding that the sale below, and all others of a similar nature, were void as a matter of law, the Court below has jeopardized broadly the rights of intervening bona fide purchasers contrary to the dictates of justice, beclouded titles and engendered litigation of indefinite scope and length. Such action contravenes the fundamental public policy in favor of strengthening public confidence in judicial sales and executed contracts.

The Court of Appeals has therefore decided an important question of federal law which has not been, but should be settled by this Court. It has decided a federal question in a way in conflict with applicable decisions of this Court. The Court of Appeals below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I.

The Court Below Erred in Holding That the Sale to the Former Officer of the Bankrupt Was Void as a Matter of Law Despite the Undisturbed Concurrent Findings of the Referee in Bankruptcy and the District Court that the Consideration Was Adequate and the Purchase Price the Highest and Best Obtainable, That the Purchaser Rendered Only De Minimus Services to Preserve the Estate, That No Secret Profit, Fraud or Conspiracy Tainted the Transaction, That There Was Full Disclosure to All Parties Concerned Including Respondents Prior to the Judicial Sale, and That the Unprecedented Proceedings Initiated to Set Aside the Sale Were, Without Good Cause, Deliberately Delayed Long After the Confirmation of the Sale and Resale to the Petitioner Herein.

The posture of the case herein is of particular significance. No question of fraud or conspiracy, lack of full disclosure, inadequacy of consideration, secret profit or any other taint affects the proceedings here. The concurrent findings of the Referee in Bankruptcy and the District Court in these respects, accepted by the Court of Appeals below, eliminates all of these factors as specific grounds for invalidating the sale. See, Federal Rules of Civil Procedure, Rule 52(a), 28 U. S. C. A.; General Order in Bankruptcy No. 47, 11 U. S. C. A., foll. Section 53. Putting these matters to the side, the Court of Appeals stated:

> "We now approach the key question whether the sale is void because Miller was a fiduciary. This does not depend upon the statutes relating to bankruptcy nor the principles of bankruptcy law or regulation. Rather, it depends upon the doctrines of the

established law of equity, which applies to all fiduciaries, whether they be express trustees, agents or sub-agents" (App. "A," p. 7).

This case therefore presents solely substantial questions of law for review by this Court, the fundamental problem being whether certain general principles of equity announced by the courts have been validly formulated and applied by the Court below to the administration and sale of bankrupt estates under the Bankruptcy Act.

A. This Court has stated:

"But to say a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?" (*Sec. & Ex. Commission v. Chenery Corp.*, 318 U. S. 80, 86.)

There has been no finding that Miller, the purchaser and former officer of the corporation, acted covertly or gained some inside information about the value of the property which had not previously been known. There was no finding of conspiracy or illicit agreement with the petitioner here to whom the property was resold. There was no secret profit, no unjust enrichment; no facts were suppressed and no unfair advantage given any person. On the contrary, the express findings, undisturbed by the Court of Appeals below, establish open and fair dealing by the officer of the bankrupt corporation with no injury to creditors or stockholders of the corporation. Nevertheless, the Court of Appeals has held that such a "fiduciary" is, as a matter of law, disqualified from purchasing the bankrupt property at a judicial sale, and that such sale is void and subject to recall no matter how many rights of bona fide purchasers have intervened.

The Court of Appeals, it is respectfully submitted, was clearly in error. The courts do not impose upon officers and directors of a bankrupt corporation any fiduciary duty to its stockolders or creditors which precludes them, merely because they are officers and directors, from purchasing the property of the bankrupt corporation. A contrary holding would undermine the fundamental policy involved in the administration and sale of bankrupt property under the Bankruptcy Act. The principal objective is to obtain the maximum price for the benefit of creditors. Thus, at an early date, this Court stated:

> "Whether Clews had been discharged at the date of the transfer to him is immaterial. After his adjudication as a bankrupt, and the surrender of his property to be admnistered in bankruptcy, he was just as much at liberty to purchase, if he had the means, any of the property so surrendered as any other person."
>
> *Traer v. Clews,* 115 U. S. 528, 541.

See also:

Clark v. Trust Company, 100 U. S. 149;

Shaw v. Railroad Company, 100 U. S. 605;

Bray v. United States Fidelity & Guar. Co., 267 Fed. 533 (C. A. 4, 1920);

In re Natural Mining Exp. Co., 193 Fed. 232 (D. C. Mass., 1911).

In *In re Rex Body Corp.,* 138 F. 2d 912, 913 (C. A. 2, 1943), the Court of Appeals stated:

> "The contention that Baron and Webster, who became purchasers at the bankruptcy sale through their Estates Clearing Corporation, were disqualified by reason of being directors as well as creditors of the bankrupt cannot be sustained."

The policy which opposes or limits purchases of corporate property by directors or officers is not applicable to sales of corporate property in bankruptcy, because in the latter case the sole purpose of the sale is to obtain the highest bid for the benefit of the creditors, the sale is involuntary and without choice on the part of the corporation, and the sole control of the sale and of bids and prices is in the hands of the bankruptcy court. In concluding that the sale of the property below was void because the purchaser was a director or officer of the bankrupt corporation, the Court of Appeals below misapplied equitable principles applicable to officers and directors of going and active corporations. In bankruptcy proceedings, corporate directors and officers no longer possess control or direction of policy and their bid is but one further source of cash in a forced and inescapable property sale. It should be noted that in the instant case the Referee found "that the consideration passing to the estate was adequate and was to the highest and best bid which the trustee received for the said assets, and that the said sale to D. J. Miller was the highest and best obtainable" [R. 62]. Under such circumstances, to declare the sale void contravened the plain purpose of the Act.

> "Bankruptcy liquidation, in view of its main objective, calls for the widest possible market for the bankrupt's assets. Accordingly it has never been held that a mere conflict of economic interests, such as exists both as to the creditor and as to the bankrupt—namely, on the one hand to sell at a maximum price, on the other, to buy at a minimum price—is sufficient reason to exclude such persons from the class of qualified bidders or purchasers. Both the

bankrupt (or his Attorney) and any creditor (or his Attorney) may purchase property disposed of in the bankruptcy sale."

Collier on Bankruptcy (14th Ed.), 1572-1573.

Moreover, the Court below emphasized that the validity of the sale in this respect "does not depend upon the statutes relating to bankruptcy nor the principles of bankruptcy law or regulation. Rather, it depends upon the doctrine of the established law of equity, which applies to all fiduciaries, whether they be express trustees, agents or sub-agents" (App. "A," p. 7). Upon this premise, it should be noted that the controlling principles of common law and equity are matters of state common law. "There is no federal general common law." (*Erie Railroad Co. v. Tompkins,* 304 U. S. 64, 78.) The question of the invalidity of sales to corporate officers and directors is a question of property title controlled by state law and interpretation. (*Thompson v. Magnolia,* 309 U. S. 478; *Wickes Boiler Co. v. Godfrey-Keeler Co.,* 121 F. 2d 415 (C. A. 2, 1941).) In California, a contract of sale to a director or officer is neither voidable nor void if the sale was just in price, if it was had after full disclosure and by a vote of approval not dependent on the vote of the interested party.

Ballentine, California Corporation Laws, pp. 102-103;

13 Cal. Jur. 2d, 88-89, 93;

Cal. Corp. Code, Sec. 820.

B. In one other respect, the decision and judgment of the Court below would appear to undermine the prime objective of the Bankruptcy Act, to minimize the opportunity for sales at maximum prices, and to cast clouds upon title to properties obtained at judicial sales in bankruptcy. We refer to the holding which equated the status of the purchaser here to that of trustee or other officer of the bankruptcy court.

The undisputed record established that Miller's minor acts of accomodation and of unexercised authority in the bankruptcy proceedings did not render him an employee or a partner or front for the Referee or Trustee or other court personnel within either the reason or policy of the Bankruptcy Act, the criminal code or applicable principles of equity. There can be no claim here that the Referee or Trustee in Bankruptcy was in any way interested in the purchase of the property, directly or indirectly. Their motives "are unquestioned" (App. "A," p. 14). There was no secret information in the possession of any person concerning the value of the property, and Miller assuredly had only such information as any officer of a corporation might have had at the time of adjudication in bankruptcy. The two months authority given him in 1949 by the Referee to assist in lease arrangements and subdivision or sale were never exercised [R. 64], was revoked at the specific request of the Trustee [R. 64-65], and the authority of the Trustee to give written instructions to the corporate officer of the bankrupt was also never exercised, other than instructions in collection of rentals from

some tenants [R. 65]. Clearly, such minor services rendered by a bankrupt for the benefit of an estate, without fraud or overreaching, upon full disclosure and without objection on the part of any interested person [R. 10], does not render such a sale void under the Bankruptcy Act or under any principle of law, it is respectfully submitted.

The record here cannot be disputed that the purchaser here was a mere accomodator, whose acts were *de minimus* in quantity and even less important in consequence. Miller acted without employment status and without representing or acting for any other person possessing such status. He received no wages and made no profit; and assuredly he neither sought nor obtained any gain for the trustee, referee, appraiser or any other officer of the Bankruptcy Court. There was here no corruption, nor appearance of corruption. Yet the sale to this purchaser, fair and open, at "the highest and best bid which the trustee received for the said assets" [R. 62] has been voided as a matter of law, jeopardizing the rights of creditors as well as those of bona fide purchasers, alike. A rule which prohibits or unsettles sales in bankruptcy under such circumstances would disserve, not subserve, bankruptcy policy, and would lower values and discourage bidding.

The decisions relied on by the Court below are inapposite. Of course, sales directly to a trustee, as *In re Stephens Co.*, 30 F. 2d 725 (D. C. Calif., 1928), or to the Court appraiser, whose action influences price-setting, as in *In re Frazin & Oppenheim*, 181 Fed. 307 (C. A. 2, 1910), or to "key employees" where there has been "a

wilful and deliberate setting up of an interest in employees adverse to that of the trust," as in *Mosser v. Darrow*, 341 U. S. 267, 272, are improper and invalid. No such comparable situation is presented here. The purchaser here was not an officer of the court who assumed a position where he might profit from the abuse of office. Upon the undisputed record, he was not required to perform, in relation to the property of the estate, any duty inconsistent with the character of purchaser upon his own account. Nothing in the decisions of this Court, or any other court, suggest that under such circumstances an otherwise valid, open, fair sale of bankrupt property at the highest price obtainable can be voided consistent with the primary purpose and objective of the Bankruptcy Act. See, *Clark v. Trust Co.*, 100 U. S. 149; *Shaw v. Railroad Company*, 100 U. S. 605; *In re Rex Body Corporation*, 138 F. 2d 912 (C. A. 2, 1943); *First Nat. Bank v. Brennan*, 18 F. 2d 540 (C. A. 3, 1927); *Bray v. United States Fid. & Guar. Co.*, 267 Fed. 533 (C. A. 4, 1920). Since uniformity and certainty are prime requisites in the administration of the Bankruptcy Act, this Court should exercise its supervisory powers in order to settle the important and fundamental questions raised by the divided opinions of the Court below.

II.

The Court of Appeals Erred in Holding That the Sale and Order Confirming the Sale Could Be Voided Despite the Failure of Respondents to Comply With the Provisions of 11 U. S. C., Section 67(c) and Despite Equitable Principles Which Barred Avoidance of the Contract of Sale.

The Court has found the contract at bar "void" and not subject to statutory or equitable defenses, on analogy to fiduciary duties in trust law. The premise is taken that a sale in trust law to a trustee in breach of trust passes no title and is *per se,* void. It is concluded from this premise that a like result should follow at bar.

The aforesaid principles enunciated by the Court below find no support in the decisions of the courts or the text writers. A purchase of trust property by a trustee from himself or at his own sale is not absolutely void but is voidable only at the option of the beneficiaries who may elect to hold the trustee to his purchase, or have the sale set aside, or they may treat the property in the hands of the trustee as still held in trust. Moreover, after the property has passed into the hands of an innocent purchaser without notice, the sale will not be set aside, and generally the right to question a purchase by the trustee belongs only to the beneficiaries, and their right may be lost by affirmance, ratification, or other estoppel. The title of a purchaser without notice of the trustee's breach of trust is not impeachable.

3 Bogert, Trusts and Trustees, p. 101;

2 Scott on Trusts, pp. 859, 860-861, 862;

2 Restatement of Trusts, Sec. 284;

54 Am. Jur., Trusts, pp. 209-210;

90 C. J. S., Trusts, pp. 475-477.

To hold that a contract of sale such as is involved here is not even voidable, but literally "void" (assuming invalidity for purposes of argument), does violence not only to settled principles of law and equity, but runs counter to the letter and spirit of the Bankruptcy Act. Here, the respondents—the only *cestuis* (creditors) complaining —fully knew, at the time of the bid and the sale, all of the facts of which they now complain [R. 10-11, 56-57], and consented with such knowledge to any technical breach of trust existing in the sale. Manifestly, they did so because they, like the Trustee and the Referee, then believed the sale was financially advantageous to the estate. Having consented once with full knowledge, these respondents cannot now be heard to complain. It is well established in trust law that a *cestui* who is *sui juris* and who consents to a breach of trust, real or technical, may not thereafter attack the trustee for that to which said *cestui* has himself given free consent. (3 Bogert, Trusts and Trustees, pp. 106-107; 2 Scott on Trusts, p. 859; Restatement, Trusts, Sec. 216.) Additionally, a court-approved sale with full disclosure and knowledge, as at bar, has always constituted an equitable validation of a sale to a trustee in trust law. Full disclosure and judicial supervision ends the reason for disqualifying the contract.

2 Scott on Trusts, pp. 868-869.

Beyond all of the aforesaid, moreover, there existed the bar of the Bankruptcy Act itself (11 U. S. C. A., Sec. 67(c)). The Court below states:

> "There was no petition for review filed within ten days under the statute . . . Here a hearing was held upon the question of validity of sale many months

later in October, which resulted in the order now under review" (App. "A," p. 3, note 4).

All of the facts were known at the time of the sale on January 13, 1950 [R. 56-57]. The Order confirming the Sale was made on January 16, 1950 [R. 9]. No petition for review was filed. A few weeks after the sale, respondents made unfounded charges of secret profit, and were told by the Referee that they could bring the purchaser in before the Referee for a full examination under oath. "This they did not do" [R. 9]. Instead, "they advisedly stood by awaiting the August 1st deadline in anticipation that D. J. Miller could not conclude the sale and that the trustee would thereupon cause proceedings to be brought to forfeit the $50,000 which up to that date D. J. Miller had caused to be deposited" [R. 9]. It was not until September 17, 1950, that the unprecedented "Petition to Set Aside Sale of Property" was filed [R. 15]. It is for these reasons that the Court below was compelled to state:

> "The attack upon the order was not made in the time specified by statute, and therefore the affirming order might have been absolute, unless the sale was void, in which event neither the sale nor the order confirming would be immunized" (App. "A," p. 2).

This Court has stated:

> "Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto. And in this respect regard may properly be had to all that has transpired before, for the conduct of the parties, their acts and

omissions, may largely interpret their action at the time of the sale."

Pewabic Mining Co. v. Mason, 145 U. S. 349, 356.

These salutary principles are embodied in the provisions of 11 U. S. C., Section 67(c). The statute "was intended to establish definitely and clearly the proceeding for review of a referee's order in the interest of certainty and uniformity." (*Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144, 152.) Pursuant to the provisions of the Act, and this Court's interpretation thereof, the lower federal courts and courts in bankruptcy have refused to avoid sales where the delays, as here, were without reason or right, and operated seriously to the detriment of the buyers at the bankrupt sale; where the avoidance of the sales would upset the dependability of bankruptcy bids and sales, and disserve the needs and interests of bankruptcy proceedings, and violate and offend the equitable rule of laches. Thus, it has been held that where a person who claims to be aggrieved by a referee's order in bankruptcy does not file a petition for review within ten days after the order sought to be reviewed has been made, such person "cannot later avail himself by a writ of certiorari, appeal or other indirect process" of the advantage which he has foregone.

In re David, 33 F. 2d 748, 749 (C. A. 3, 1929), cert. den. 280 U. S. 514.

See also:

In re Bender Body Co., 139 F. 2d 128 (C. A. 6, 1943);

In re Sadler, 104 Fed. Supp. 886 (D. C. Calif., 1952);

In re Peoples Cab Co., Inc., 89 Fed. Supp. 577 (D. C. Pa., 1950).

Contrary to fundamental principles of equity and the express provisions of the Bankruptcy Act, the Court below has sanctioned the invalidation of judicial sales in bankruptcy under circumstances which can create only confusion, hardship and uncertainty in the administration of the Act. This Court should clarify the law for the essential benefit of the bankruptcy courts and their officers, as well as for creditors and purchasers alike.

Conclusion.

Important and substantial problems affecting the sound administration of the Bankruptcy Act are presented here which ought to be resolved by this Court. Moreover, the rights of bona fide purchasers are involved. To hold, as did the Court below, that innocent purchasers may be disturbed and jeopardized in their titles would be highly impolitic and seriously injurious to bankruptcy sales. Ordinarily those who seek equity must first do equity. Even this has not been required in the instant case. In the interests of justice, to quiet confusion and possible needless litigation, this Court, it is respectfully submitted, should pronounce the definitive law applicable to the case herein, and others of a similar nature.

Wherefore, the Petition for writ of certiorari to the Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

CHARLES E. TAINTOR,
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WILLIAM B. MURRISH,
Of Counsel.

APPENDIX "A."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Donovan & Schuenke, Horace F. French, Ralph A. McClure and A. E. French, Appellants, vs. Paul W. Sampsell, Trustee of the Estate of Ridgecrest Development Co., bankrupt, L. E. Seversen, L. M. Vreeland, D. J. Miller and Paul Freedman, Appellees. No. 13,396. May 10, 1955.

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Before Stephens and Fee, Circuit Judges, and McCormick, District Judge.

James Alger Fee, Circuit Judge.

This is an appeal from an order of the District Court affirming an order of a Referee in Bankrupcty refusing to set aside a sale to D. J. Miller of property of the bankrupt estate of the Ridgecrest Development Company, a corporation, of which he was President. Appellants contend Miller acted in a trust capacity for the officers of the bankruptcy court, and therefore the sale to him was void.

The Ridgecrest Development Company, a corporation, was adjudged a bankrupt in May, 1947, and the proceedings were referred to Referee Bergman and later to Referee McGugin.[1] Paul W. Sampsell, an experienced

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[1]Each of these officers is hereafter referred to without distinction as the "Referee."

and able officer, was appointed Trustee[2] the following month. D. J. Miller, L. E. Seversen and L. M. Vreeland were President, Vice-President and Secretary, respectively. The corporation owned at the time of bankruptcy adjudication, a tract of land at the desert town of Ridgecrest, California, near a United States military base, and some rental town structures including a theatre which had been erected upon the property.

On January 13, 1950, the Ridgecrest property was sold to Miller, lately resigned as President[3] of the bankrupt, for $131,000.00. The sale was confirmed January 23. Miller was given extensions of time to pay the purchase price of the property, which he had resold to one Freedman before he bid. He finally put up all the money, and the sale was completed in August of the same year.

On September 17, the present appellants, who were creditors of bankrupt, petitioned the Referee to set aside the sale on the ground that it was void. Answer was filed by the Trustee, and a hearing was had. The Referee filed findings, conclusions and an order denying the relief prayed. Upon review, the District Court affirmed the order, and this appeal was taken.

The attack upon the order was not made in the time specified by statute, and therefore the affirming order

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[2]Referred to in the opinion as the "Trustee."

[3]The finding of the Referee contains the following recital: "D. J. Miller was the president of the bankrupt corporation, and prior to the sale tendered his resignation as president to the said defunct bankrupt corporation." As will be seen hereafter, Miller's fiduciary obligations to the creditors of the corporation were fixed upon insolvency thereof. He could not shed them by resigning. Furthermore, a corporation bankrupt and insolvent is not properly described as defunct.

might have been absolute,[4] unless the sale was void, in which event neither the sale nor the order confirming would be immunized.

Issue. Whether or not a sale of real property is void when made from the bankrupt estate to an agent of the Trustee employed to sell such real property.

There are three questions in the case: (a) Whether the cooperation of the officers of the bankrupt corporation and the eventual purchaser from Miller, whose name was Paul Freedman, indicated a conspiracy which would render the sale void. (b) Whether Miller was a "referee, receiver, custodian, trustee, marshal or other officer of the court," whose purchase would be criminal and inferentially void under 18 U. S. C. A., §154. (c) Whether Miller, by virtue of his employment by the Trustee under orders of the court, was a fiduciary and the sale void under the general principles of law.

The various methods of employment of Miller as an agent of the Trustee of the bankrupt estate, of which he was still President, will not be reviewed now. Prior to the first employment, the Referee had said that he was not going to appoint any officer of the bankrupt corporation as an agent of the court, but Miller actually was compensated as such agent on his own insistence from the time the Trustee took office. The Trustee thereafter attempted to make a sale of assets on five different dates before the sale of a great part thereof was confirmed to Miller in January, 1950. On December 8, 1947, Janu-

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[4]There was no petition for review filed within ten days under the statute, 11 U. S. C. A. §67(c). See Pfister v. No. Illinois Finance Corporation, 317 U. S. 144. Here a hearing was held upon the question of validity of sale many months later in October, which resulted in the order now under review.

ary 3, 1948, May 4, 1948, October 4, 1948, and April 23, 1949, there were abortive efforts to sell. Finally, it was sold on January 13, 1950, to Miller. A previous sale had been confirmed on May 4, 1948, to Nathan King for $136,500.00, subject to real estate broker's commission of $6,500.00, or a net of $130,000.00. This sale was opposed by the bankrupt corporation by filing a review of the order of the Referee, with the concurrence of Miller, Seversen and Vreeland, officers of the corporation at that time. Upon the hearing of petition for review thereof, on June 7, 1948, a bid was made by Joseph Gottlieb in the amount of $140,000.00, but Gottlieb refused to go through with the sale. From May 12, 1947, throughout 1948 and part of 1949, Miller, Seversen and Vreeland, as officers of the bankrupt, maintained that the assets should and could be sold for $200,000.00. Throughout this whole period, in support of this contention, they opposed the attempted liquidation sales by the Trustee.

Miller, Seversen and Vreeland were present on January 13, 1950, when the property was sold by the Referee to Miller. Miller asked the Referee if he could be a purchaser, and the Referee said "Yes." When the high bid of $131,000.00 was made by Miller, he was asked if it was a personal bid or made on behalf of the corporation for the benefit of the stockholders and whether Miller would turn the property over for that price on reorganization. Miller answered "No." There was testimony from which it might have been found that one of principal creditors of the bankrupt was on the ground and prepared to bid $135,000.00 in cash for the property, which was a sufficient amount to pay off the "unsecured claim, the creditors, at one hundred cents on the dollar." After a conversation in which Miller took part, he decided it was unnecessary to make that bid.

Miller secuerd the consideration as follows: $10,000.00 down payment was secured from Seversen, about $96,-000.00 from Paul Freedman, the ultimate purchaser, the balance from Seversen in cash and cancellation of $13,-600.00 encumbrances. As a part of the bid and the sale, Miller had entered into an agreement with Freedman, before making the bid, to take and receive title by paying Miller $50,000.00 in cash, $50,000.00 secured by trust deed on the property sold, and Freedman was to convey to Miller three pieces of property, the value of which, according to the findings of the Referee, was $39,000.00.

A mere recital of these facts indicates that there was ample ground for the creditors of the corporation to question the validity of the transaction. The clouds of suspicion certainly gathered ominously around the situation. No one has questioned the honesty and integrity of the Referee and of the Trustee. Both of these officers are spoken of highly. But it must be remembered that Miller, Vreeland and Seversen had all been officers of an existing corporation, insolvent and bankrupt, the creditors of which looked on these proceedings with distrust. Freedman was an outsider. The duties of these corporate officers were to protect the creditors of Ridgecrest. But here, conspicuously, there were four violations of their trust obligations: (a) allowing a bidder to believe that a bid of $135,000.00 was not necessary to pay off the corporate debts; (b) refusing to hold the property purchased for the corporation, its stockholders and creditors, (c) accepting property personally from Freedman in part payment, and (d) dealing in the assets of the bankrupt corporation of which they were officers.

Fiduciary obligations are imposed upon corporate officers of a concern which is insolvent. They cannot buy

claims against it, deal in its stock or traffic in its property. The courts refuse profit on or set aside such transactions even where bankruptcy has not intervened.

> "The policy of the law is to insure fidelity of trustees to their trusts by making it impossible for them to profitably neglect or abuse them." Bramblet v. Commonwealth Land and Lumber Co., 26 Ky. Law Rep. 1176, 1179, 83 S. W. 599, 602.

And the intervention of bankruptcy does not terminate his responsibility as an officer of the corporation. Even if the relationship had ended, the fiduciary capacity was not lost.

Sometime in March, 1950, the creditors here involved as appellants made representations to the Referee, claiming that fraud was involved in the transaction. Notwithstanding these suggestions, Miller was allowed until sometime in August to pay the balance of the bid price into the escrow, and a hearing was never had upon the charges thus made.

However, the Referee has found that the price paid was adequate and that Miller, Seversen and Vreeland did not receive any profit on resale to Freedman. The Referee also finds as a fact that there was no conspiracy. Upon this basis, therefore, the Court concludes that these findings must be respected and the first ground of attack fails. However, the violation of the obligations of trustees for creditors of the corporation and the deeply divided loyalties may be used in appraisal of the other problems to a consideration of which we now come.

The next question is whether the sale to Miller is void because of the express language of Section 29 of the Bankruptcy Act, 18 U. S. C. A., §154, which provides:

> "Whoever, being a referee, receiver, custodian, trustee, marshal, or other officer of the court, knowingly purchases directly or indirectly, any property of the estate of which he is such officer in bankruptcy proceeding; * * *
>
> "Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant."

This is a criminal statute. This Court should not decide in a civil case the inclusionary and exclusionary limits of the words used in the Act. It will be time enough to consider such a matter when it is raised in an appropriate setting. As we are reviewing the conduct of these officers of the bankrupt and particularly the acts and position of Miller, we should not intimate as to whether we have any opinion whatsoever upon that question.

We now approach the key question whether the sale is void because Miller was a fiduciary. This does not depend upon the statutes relating to bankruptcy nor the principles of bankruptcy law or regulation. Rather it depends upon the doctrines of the established law of equity, which applies to all fiduciaries, whether they be express trustees, agents or sub-agents.

A review of the facts indicates clearly the position occupied by Miller with reference to the bankrupt estate. The review of the record highlights this situation. Soon after Sampsell was appointed trustee of the bankrupt estate, on June 21, 1947, Miller told Sampsell that Ridgecrest would pull out of bankruptcy and he wanted to conserve expenses, so he volunteered to look after the Ridgecrest properties because he was President and he

lived at Ridgecrest. Miller apparently treated this as an employment after June 6, 1947. Several months after the case started, Miller told Sampsell that he would not be able to donate his services. The Trustee told Miller then that he never employed an officer of a bankrupt as an "agent." Sampsell, who obviously did not believe Miller was then his employee, received a direction from the Referee to employ Hancock, who served until November 2, 1949. Seversen wrote to the Referee on November 17, 1947, urging that Miller be retained to look after the Ridgecrest properties. Miller filed a petition January 26, 1948, for compensation for services to the estate from June 6, 1947, to January 6, 1948, at $100.00 per month, and the next day the Referee authorized payment of $700.00 to Miller on account thereof. In April, 1949, Miller, Seversen and Vreeland, as President and directors, petitioned the Referee to continue sale for six months, to enable a buyer to be obtained for $200,000.00. During this period of time no action was actually taken by September, 1949, Miller went to the Referee and convinced him that Miller could arrange a satisfactory subdivision program which would be beneficial to creditors. Upon the *ex parte* petition of Miller, the Referee entered an order which contains the following provisions:

> "It is Hereby Ordered that D. J. Miller, be, and he is hereby appointed the exclusive agent and representative of the trustee appointed herein, and the above entitled bankrupt estate, and he is hereby given the power and authority to do all things necessary in the subdividing, leasing and selling of all real property belonging to said estate, subject to the approval of this Court.

"It is Further Ordered that the Trustee, Paul W. Sampsell, be, and he is hereby ordered to pay to said D. J. Miller, beginning forthwith as and for his services in connection with the aforesaid appointment the sum of One Hundred Dollars ($100.00) per month.

"It is Further Ordered that said Trustee's Agent, W. E. Hancock, be, and he is hereby restricted in his dealing with said real property to the collection of rents under existing leases, and said agent is hereby restrained from otherwise dealing with or attempting to deal with said real property."

Sampsell, the trustee, was aroused by this and filed a petition to vacate the appointment, which came on for hearing, whereupon the Referee made the following order:

"It Is Ordered, Adjudged and Decreed that the order appointing D. J. Miller as sales and leasing representatives dated September 9, 1949, wherein D. J. Miller was appointed as exclusive agent and representative of the trustee is hereby vacated and set aside and is to be of no further force and effect.

"It Is Further Ordered that D. J. Miller be, and he is hereby employed by the trustee at the sum of $100.00 per month and that he do only those things in connection with the above estate upon written instructions from the trustee or one of the trustee's attorneys, and that he be paid the sum of $100.00 per month, plus 7¢ per mile for traveling expenses and hotel expenses, but that all expenses are to be approved by the undersigned referee; and

"It Is Further Ordered, Adjudged and Decreed that the W. E. Hancock services be terminated at the expiration of its present monthly employment."

After reciting the terms of these successive orders, the Referee found:

> "The Referee further finds that at the time of said sale the said D. J. Miller was not the agent of the trustee other than as set forth hereinabove. The Referee further finds that at no time was the said D. J. Miller an officer of the Court herein. The Referee further finds that all of these facts and circumstances pertaining to the services of said D. J. Miller rendered to this estate and to the trustee, were known to the Referee."

Miller bid the property January 13, 1950. Sale was confirmed January 23, 1950. Some time after his employment as "exclusive agent" was ended by order dated February 10, 1950. The record does not show that he demanded or was paid the stipulated salary of $100.00 per month.

Irrespective of the cryptic finding, Miller did not cease to be the agent of the Trustee with respect to this very property. The recitals of fact show he was an agent and thus a fiduciary for hire of the Trustee and Referee to deal in the same property which was sold to him. It would be a contradiction of the record for this Court to hold that Miller was not an agent of the Referee and Trustee under an appointment in effect at the time of the sale to him. This is not a question of fact, but a question of law upon the written documents and other uncontroverted facts recited by the Referee in his findings. There are three grounds for holding that Miller was charged with responsibility of a trustee in his relation to the bankrupt corporation, its creditors, its property, and the Court. (1) He had recently been an officer of the bankrupt corporation; (2) the obligation grew out of his

duty in virtue of his connection with the affairs of the bankrupt corporation while administration was proceeding; and (3) the officers of the court could not deal in the property of the bankrupt and could not authorize their employee, Miller, to do so.

Once a corporation is adjudged a bankrupt, the equitable powers of the court are used in accordance with considerations of public policy, which are deeply grounded upon fundamental principles. There the obligations of an officer or director of a corporation to the stockholders and creditors often require drastic measures. As was said by Mr. Justice Douglas in Pepper v. Litton, 308 U. S. 295, 306:

> "A director is a fiduciary * * * So is a dominant or controlling stockholder or group of stockholders. * * * Their powers are powers in trust. * * * While normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders."

These words are most apt in considering whether Miller, as President of Ridgecrest,[5] was a fiduciary whose obligations to the creditors would be enforced by the bankruptcy court once the corporation entered those portals.

Second, the policy of the law relating to courts of bankruptcy to charge with the obligation of utmost good faith

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[5]If one is charged with fiduciary obligations in the bankruptcy court, he is not relieved of the burden because he resigns office. (See Curtis v. Drybrough, 70 F. Supp. 151.)

is not confined in effect to the narrow circle defined by the criminal statutes, but extends to everyone who is connected with the court or its officers. As was said in the opinion, *In re* Frazin & Oppenheimer, 2 Cir., 181 Fed. 307, 309:

> "The application of these principles is not dependent upon the engagement of one person by another in a confidential capacity. There need be no contract of employment at all. There need be no formal relation of trust. The disability grows out of the duty. In our opinion the rule of equity should be so broadly applied as to embrace all persons who have a duty to perform with respect to the property of others and with the proper performance of whose duty the character of a purchaser of such property may be in any degree inconsistent."

We recognize that the policy above outlined controls in this case, and that upon this ground alone by virtue of his employment by the officers of the court and his concern with the corporate affairs he was vested with the obligations of a fiduciary.

Third, neither the Referee nor the Trustees could personally have acted in these premises. What these officers could not do themselves, they could not authorize one of their agents to do legally.

In commenting upon the criminal statute above referred to, Judge McCormick says:

> "The second gross irregularity, and one which can never be sanctioned by a court of equity, was the purchase by the trustee of property of the bankrupt estate. It was shown by the trustee's report that three articles, to-wit, a table, a bench, and a typewriter, were purchased by the trustee. The pecuniary value

of these articles is small and negligible, and may negative dishonesty, when compared with the magnitude of the estate; but to sanction a transaction wherein a trustee purchases, for himself and for his benefit, property of the trust estate, would do violence to every established principle of trusts, and would invite dishonesty in the relations of trustee and beneficiaries, and imperil the whole scheme of trusts." *In re* Stephens & Co., D. C., 30 F. 2d 725, 726.

It may be objected that Miller is thus brought within the policy of a statute which does not in name include him. But the only purpose of this quotation is to show that the Referee and the Trustee could not have performed these acts themselves. Therefore, they would also be liable, irrespective of good faith, if they permitted one of their sub-agents or employees to do any act which they themselves could not do. This is directly decided in the case of Mosser v. Darrow, 341 U. S. 267, 271-272:

> "These strict prohibitions would serve little purpose if the trustee were free to authorize others to do what he is forbidden. * * * We think that which the trustee had no right to do he had no right to authorize, and that the transactions were as forbidden for the benefit of others as they would have been on behalf of the trustee himself."

The considerations of public policy make any person a trustee or fiduciary who has had connection with any other person or entity or who has been employed or concerned with the affiairs of others and thereby acquired a knowledge of the property and concerns of the others. This obligation of the trustee will be enforced by the courts by

any methods which are necessary to prevent the appearance of divided loyalties or improper administration.

The question of whether the sale was valid or no is easily answered now. A fiduciary cannot purchase property which he is empowered to sell. D. J. Miller was a fiduciary. Property in custody of a court of bankruptcy has a special status and is sacrosanct. No dealings therein will be tolerated which are tainted with the possibility of unfairness or of conflict between personal desires and trust obligations.

> "The Courts of Chancery have been astute to protect property actually or potentially within custody from deterioration or interference by anyone whether party or stranger. This power is inherent in the court, which could not otherwise administer justice or protect litigants and the public." *In re* Portland Electric Power Company, 97 F. Supp. 903, 914-16.

Where the property is in possession of the bankruptcy court, an interested party need only prove that the purchaser was in a trust relationship with regard to the property itself, the creditors of the estate or the officers of the court, to render the sale void.

It was said in the decision, *In re* Levinson, 297 Fed. 490, "Clinton, as trustee, could not acquire title." Therefore, neither Referee nor Trustee in this case, albeit their motives are unquestioned, could authorize Miller to purchase at the sale and, if he did, he acquired no title.

> "Wilson and Smith are therefore jointly and severally liable for all profits resulting from the purchase; the former although he had no other relation to the estate; the latter, without regard to the fact that he was also counsel for the receiver." Jackson v. Smith, 254 U. S. 586, 589.

> "In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells." Michoud v. Girod, 45 U. S. 503, 555.

Even if there were full disclosure, adequacy of consideration, absence of secret profit, an open judicial sale will not avail separately or in combination as a defense for such a fiduciary.[6] The prohibition is absolute in the public interest. It is established to protect the courts themselves from suspicion of chicanery.

But it is said that the *status quo* cannot be established, and the innocent will suffer. But this is always a possibility where property in custody of a bankruptcy tribunal is dealt with by unauthorized persons. The record shows that Freedman, even though he may not have entered an unlawful conspiracy, knew all of the essential facts. Besides, the transaction was open and notorious if the version of Miller and Freedman be accepted. The filing of a petition in bankrutcy is a warning to all that property actually or constructively in possession of the court is trust property and is dealt with by everyone at peril. See Bank of California, National Association v. McBride, 9 Cir., 132 F. 2d 769.

Ordinarily, the findings of a Referee, affirmed by a District Court, as this one was, should be respected by the appellate courts. However, the facts show that Miller, a former officer of the bankrupt corporation, acted as a fiduciary with respect to this particular property. He was

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[6]From the simple finding of the existence of the trust relationship and the transfer, the inference of fraud is compelled as matter of law. There are many other similar situations. *Cf.* Heath v. Helmick, 9 Cir., 173 F. 2d 157, 161-162.

paid compensation for his services in that regard. Under the circumstances, a sale to him cannot be upheld. It is elementary that a fiduciary cannot deal or receive a transfer of the property which is the subject of the trust. It makes no difference whether the fiduciary be called an agent, custodian, trustee or officer. It makes no difference whether it can be proved that the fiduciary profited by the transaction. The principle is established by general law and does not depend upon the existence of a statute for enforcement. To affirm this sale would seem to place a premium on shady dealings in a court of bankruptcy.

The order is reversed and the sale is held void.

STEPHENS, Circuit Judge, dissenting

I dissent:

Heretofore I prepared an opinion in this case in which I held that there were irregularities in the administration of the estate which, in my opinion derived from a commendable though perhaps unwise effort to reduce expenses and save creditors from losses. My associates were not in agreement with my view, and the opinion by Judge Fee, approved by Judge McCormick, followed.

The action of the referee as to Miller's acting as sales agent was unquestionably wrong and never met with the approval of the trustee. However, I cannot find more than a vague suspicion of any crookedness in the administration emanating entirely from the mere possibility that Miller acted unfaithfully. The attack upon the proceeding was long delayed and should not be successful, with the consequent disturbance of land titles based upon court orders, unless positive fraud was both alleged and proved. These requisites seem to me to be lacking. I would affirm.

(Endorsed:) Opinion and Dissenting Opinion. Filed May 10, 1955. Paul P. O'Brien, Clerk.

APPENDIX "B."

Judgment of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Donovan & Schuenke, Horace F. French, Ralph A. McClure and A. E. French, Appellants, vs. Paul W. Sampsell, Trustee of the Estate of Ridgecrest Development Co., bankrupt, L. E. Seversen, L. M. Vreeland, D. J. Miller and Paul Freedman, Appellees. No. 13,396.

JUDGMENT.

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellants and against the Appellees, and that the sale is held void.

It is further ordered and adjudged by this Court, that the Appellants recover against the Appellees for their costs herein expended and have execution therefor.

(Endorsed:) Judgment. Filed and Entered: May 10, 1955. Paul P. O'Brien, Clerk.

APPENDIX "C."

Opinion and Order of United States Court of Appeals for the Ninth Circuit Upon Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Donovan & Schuenke, Horace F. French, Ralph A. McClure and A. E. French, Appellants, vs. Paul W. Sampsell, Trustee of the Estate of Ridgecrest Development Co., bankrupt, L. E. Seversen, L. M. Vreeland, D. J. Miller and Paul Freedman, Appellees. No. 13,396.

Jun. 21, 1955.

Upon Petition for Rehearing.

Before: STEPHENS and FEE, Circuit Judges, and McCORMICK, District Judge.

Now on this day this matter coming on to be heard upon the petitions for rehearing by appellee Paul Freedman, petition of Bank of America National Trust and Savings Association for leave to file brief as *amicus curiae* in support of petition for rehearing and brief of *amicus curiae,* and application for permission to file answer to petition for rehearing and affidavit in support thereof; and

It appearing to the Court that appellee Paul Freedman was found by the Court not to have been an innocent purchaser, but having been an active participant in an official bankruptcy sale, which was void of record because of the participation of officers of the Court in conjunction with Paul Freedman in the purported purchase of property in the custody of the Bankruptcy Court; and

It appearing to the Court that Paul Freedman, although an appellee, filed no brief upon this appeal, but allowed his interest to be represented by other appellees, and it appearing to the Court that he thereby has no standing

to present a petition for rehearing, and the Bank of America National Trust and Savings Association having had no permission of the Court to file brief as *amicus curiae* and having been fully of notice of the custody of the Bankruptcy Court of the property involved, now, therefore, it is hereby

Ordered that the petition for rehearing by the appellee Paul Freedman is hereby denied, and the petition of the Bank of America National Trust and Savings Association for leave to file brief as *amicus curiae* in support of petition for rehearing is denied; and it is further

Ordered that the brief of *amicus curiae* tendered to this Court as an addenda to the petition of Bank of America National Trust and Savings Association is hereby stricken from the files; and it is further

Ordered that the application for permission to file answer to petition for rehearing, filed by attorneys for appellants Donovan & Schuenke, is denied.

JAMES ALGER FEE,
Circuit Judge.

PAUL J. MCCORMICK,
District Judge.

(Endorsed:) Order on Petition for Rehearing. Filed Jun. 21, 1955. Paul P. O'Brien, Clerk.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 403

PAUL FREEDMAN,

Petitioner,

vs.

DONOVAN & SCHUENKE, HORACE F. FRENCH, RALPH A. McCLURE and A. E. FRENCH,

Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari.

Introductory Comment.

Primarily we wish to note that petitioner's "Statement of the Case" is inaccurate, deficient and needs revision and correction. It skirts the pertinent and material facts and presents a faulty appraisal of the record.

In contrast to petitioner's purported statement of the case, the respondents' counter statement hereinafter set out is based upon the essential and material facts disclosed by the record, some of which were mentioned by the United States Court of Appeals as having a material bearing in a proper determination of the issues involved.

Briefly stated, this case involves an asportation of bankruptcy assets by a fiduciary, D. J. Miller, who was aided and abetted by petitioner herein. In fact, the fiduciary, Miller, could not have accomplished his fraudulent scheme without the financial aid and active participation of petitioner.

Contrary to the petitioner's contention, the record in this case shows an abortive purchase made by the petitioner in fraud of the creditors of the bankruptcy estate, and in total disregard of the well settled legal and equitable principles applicable to sales of bankruptcy assets.

Petitioner Has No Standing to Present a Petition for a Writ of Certiorari.

The petitioner here for a writ of certiorari, although named as a respondent in the proceedings before the Referee and upon review in the District Court, and as an appellee in the United States Court of Appeals, filed no brief upon review or upon appeal and made no appearance in either of said Courts, but permitted his interests to rest upon the showing made by the trustee, and thereby has no standing to present a petition for writ of certiorari. (See opinion of the United States Court of Appeals denying petitioner's petition for rehearing upon this and other grounds. Appendix "C", pages 18-19, Petition for Writ of Certiorari.) It is obvious that neither the trustee nor D. J. Miller is seeking a writ of certiorari.

Jurisdiction.

Petitioner has failed to show a good reason under Rule 19 of the Rules of this Honorable Court why this Court should assume jurisdiction. There is no conflict of opinion in the Courts of Appeals upon this question and this

Honorable Court has passed upon similar questions adversely to petitioner's contention in *Mosser v. Darrow*, 341 U. S. 267, 271; *Jackson v. Smith*, 254 U. S. 586, 589; *Michand v. Girod*, 45 U. S. 501. See also: *In re Frasin v. Oppenheimer*, 2 Cir., 181 Fed. 307; *In re Stephens & Co.*, D. C., 30 F. 2d 725, 726; *In re Van Sweringen Company*, 119 F. 2d 231. Note particularly the forceful expressions of Justice Cardozo upon the question here involved in the case of *Meinhard v. Solmon*, 249 N. Y. 458, 464; 164 N. E. 545, 546; 62 A. L. R. 1, and quoted in the *Van Sweringen Company* case above cited.

State Statutes Involved.

The Statutes and Case Law of California applicable to the questions involved are set forth in the appendix.

Counter Statement of the Case and Facts.[1]

The Ridgecrest Development Company, a corporation, was adjudicated a bankrupt on or about May 12, 1947. The order of reference was to Referee Waldo R. Bergman, who was subsequently succeeded by Referee William A. McGugin. The bankrupt corporation owned, among other properties, a large and valuable tract of land at Ridgecrest, California, which was partly developed.[2]

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[1]An explanation of the record is in order. The Court reporter, in transcribing the evidence, included certain evidence received by the Referee on the same day in relation to objections to claims. The hearing and evidence in relation to the Order to Show Cause why the order confirming sale should not be set aside begins at page 113 of the Record.

[2]Ridgecrest is in Kern County, in the Mojave Desert, near a large naval training base. This desert area has undergone extensive development since World War II.

Paul W. Sampsell was appointed trustee of this estate on or about June 21, 1947, and has continued to act as such. D. J. Miller was the president of the bankrupt. L. E. Seversen was its vice-president, and L. M. Vreeland its secretary. [See Find. No. III, R. p. 55.]

The trustee attempted to make a sale of the assets of this bankrupt estate upon five different dates before the sale was confirmed to D. J. Miller in January, 1950 [see Find. No. IV, R. p. 55] and each of these attempted sales was vigorously opposed by D. J. Miller [R. p. 128] and the other officers of the bankrupt, L. E. Seversen and L. M. Vreeland. [See Find. No. V, R. pp. 55-56.]

The protests were so vigorous that Miller, in the name of the bankrupt corporation, filed a review of the order of the Referee, under date of May 4, 1948, confirming a sale to one Nathan King for $136,500.00, *Miller contending that the property was worth $200,000.00.* [See Find. No. V, R. p. 55, and testimony of Paul W. Sampsell, R. p. 128. See also affidavit of Miller in evidence as Pet. Ex. 4, R. pp. 124-125.]

The Referee, upon the *ex parte* application of D. J. Miller, signed an order on September 9, 1949, appointing Miller the exclusive agent of the trustee for the purpose, among others, of selling the property in question [R. pp. 49-50], and providing for a salary to Miller of $100.00 per month. Miller petitioned for the payment of his salary and it was ordered paid. [R. p. 85.] The United States Court of Appeals says in its opinion: "He was paid compensation for his services in this regard." This order was in an immaterial aspect modified by the order of November 2, 1949. [R. pp. 51-52.] This later order was in effect on the date of the order confirming the sale of the property to Miller.

Although Miller was paid a salary for the purpose, among others, of selling the property, he produced no purchaser other than himself. It should be noted that although Paul Freedman was interested in acquiring the property, he did not bid at the bankruptcy sale.

Miller agreed to sell the property to Freedman and Freedman agreed to purchase from Miller, and an escrow was entered into between Miller and Freedman before the sale was confirmed to Miller. [R. pp. 146-155, incl.] [See also Find. No. XIV, R. pp. 59-60.]

On January 13, 1950, the property again was offered for sale and Miller was the successful bidder for the sum of $131,000.00. After the sale was confirmed to Miller, he was not required to pay the purchase price over to the trustee until he had collected the money from Freedman some seven months later. [Find. No. X, R. pp. 57-58.] In this respect he was given consideration which no other prospective purchaser could have obtained.

Although Freedman had originally agreed to pay only $50,000.00 cash to Miller, he subsequently aided Miller in making the cash payments to the trustee by advancing to Miller $100,000.00 in cash [R. p. 154] and permitted the property which he traded to Miller to be encumbered in order to raise the balance of the purchase price for the trustee. Even counsel for petitioner assisted Miller in raising this money. [Find. No. XVI, R. p. 61.] While Freedman admittedly had knowledge that this was a bankruptcy sale and a bankruptcy asset, he refrained from bidding at the bankruptcy sale.

Seversen wrote a letter to the Referee on November 17, 1947, urging that Miller be retained to look after the Ridgecrest properties. Seversen also aided and assisted

Miller in raising the money to cover his bid. These facts are mentioned by the United States Court of Appeals as material facts. (See Opinion, U. S. Court of Appeals.)

The undisputed evidence shows that Miller did receive a substantial profit, the representations of counsel for the petitioner to the contrary notwithstanding. [See testimony of Mr. Mikiel, R. p. 167; also Find. of Referee No. XV, R. pp. 60-61.] Mr. Freedman gave Miller a total of $100,000.00 cash [R. p. 154] plus three properties described in the record and findings, which the Referee found to be of a value of $39,000.00. The difference between the $139,000.00 and the price paid to Miller represents a profit, although we contend the profits exceeded this amount.

Another important and glaring error in the Referee's findings will be noticed from a comparison of Finding XV [R. pp. 60-61] with the only evidence on the subject. In this finding the Referee finds the value of parcel 1 is the sum of $14,000.00. The only witness upon the question of values testified it had a value of "between $15,000 and $16,000." [R. p. 174.] In his finding as to parcel 2, the value fixed by the Referee is $17,500.00. The Witness testified it had a value of "$18,000 to $20,000." [R. pp. 172-173.] Finding as to parcel 3 fixes the value of $7,500.00. The witness testified it had a value of "from $8500 to $10,000." [R. p. 170.] The Referee's findings show a total value of $39,000.00. The testimony of the witness shows a minimum value of $41,500.00, and a maximum value of $46,000.00. Thus Miller received in value from $141,500.00 to $146,000.00 for the property for which he turned over to the Bankruptcy Court $131,000.00, thereby realizing a profit of from $10,-

500.00 to $15,000.00 without the use of one cent of his own money. The deed from Miller and wife to Freedman, dated February 8, 1950 (fourteen days after the trustee's deed was dated and before Miller paid the trustee the sales price) shows cancelled Internal Revenue stamps of $192.-50, representing the sales price of $175,000.00 or a profit to Miller of $44,000.00. (The Court of Appeals had before it a photostat of this deed which was attached to the petition of the Bank of America for permission to file a brief as *Amicus Curiae* in support of a petition for rehearing.) It is important to keep in mind also that he stalled the Bankruptcy Court along for seven months without paying for the property, and finally paid for same with funds received from Freedman and with funds borrowed upon the strength of the security of the real property he received from Freedman.

Although the Court of Appeals did not disturb the Referee's finding No. XV, such action by the Court of Appeals was unnecessary in view of its finding that the sale to Miller was void. The values of these properties would become important if and when Miller is called upon to account for the illegal profits made by him in this transaction.

Paul Freedman was still the record owner when respondents here filed their petition on September 17, 1950, to set aside the sale to Miller, and Freedman made no contention to the contrary at the hearing before the Referee. Therefore, there were no intervening rights of alleged bona fide purchasers as suggested by counsel for petitioner in point three, page 3 of his petition.

May we also point out that the statement in footnote number 3, page 11, petition for writ, is not supported by the record.

Photostats of all deeds herein were attached to the petition of the Bank of America for leave to file brief as *Amicus Curiae* in support of Freedman's petition for rehearing in the Court of Appeals. All of these deeds disclosed the amount of United States Internal Revenue Stamps attached thereto indicating the purchase price in each case. Also the date of transfer in each instance.

Upon learning in September, 1950, of the order of Court appointing Miller as the agent of the trustee, appellants, on September 17, 1950, filed their petition herein [R. pp. 15-24] seeking to set aside the sale to Miller and for other equitable relief, basing their claim, among other things, on the fact that the sale was void under Section 154 of Title 18, U. S. C. A. Chapter IX. [Pet. Par. X, R. p. 19.] An order to show cause and a temporary restraining order was issued. The trustee filed an answer thereto in which essential facts were admitted. [R. pp. 25-49.] The property at this time still stood in the name of Mr. Freedman.

The matter came on for hearing on October 9, 1950, and was concluded on October 20, 1950, and the Referee made his findings of fact, conclusions of law and an order denying the relief sought in the petition [R. pp. 53-68], from which order a petition for review was filed. [R. pp. 69-76.] The District Judge on March 12, 1952, affirmed the Referee's order [R. pp. 77-78] from which order an appeal was taken. The Court of Appeals reversed the order of the District Court, decreeing the sale to be fraudulent and void.

The Controlling Findings of Fact and Conclusions of Law of the Referee, Which Were Contrary to Our Contention, Were Rejected by the Court of Appeals as Not Being Sustained by the Record.

Petitioner contends that the Court of Appeals (Pet. for Cert., p. 6) left undisturbed the Findings of Fact and Conclusions of Law of the Referee.

The Court of Appeals, in its opinion, says:

> "Irrespective of the cryptic finding, Miller did not cease to be the agent of the Trustee with respect to this very property. The recitals of fact show he was an agent and thus a fiduciary for hire of the Trustee and Referee to deal in the same property which was sold to him. It would be a contradiction of the record for this Court to hold that Miller was not an agent of the Referee and Trustee under an appointment in effect at the time of the sale to him. This is not a question of fact, but a question of law upon the written documents and other uncontroverted facts recited by the Referee in his findings."

The Court further says:

> "It may be objected that Miller is thus brought within the policy of a statute which does not in name include him. But the only purpose of this quotation is to show that the Referee and the Trustee could not have performed these acts themselves. Therefore, they would also be liable, irrespective of good faith, if they permitted one of their sub-agents or employees to do any act which they themselves could not do. This is directly decided in the case of *Mosser v. Darrow*, 341 U. S. 267, 271-272. . . .
>
> "Ordinarily, the findings of a Referee, affirmed by a District Court, as this one was, should be respected by the appellate courts. However, the facts show

that Miller, a former officer of the bankrupt corporation, acted as a fiduciary with respect to this particular property. He was paid compensation for his services in that regard. Under the circumstances, a sale to him cannot be upheld."

The Court of Appeals also says:

"On September 17, the present appellants, *who were creditors of bankrupt,* petitioned the Referee to set aside the sale on the ground that it was void." (Emphasis ours.)

This last quotation would seem to put at rest the question of whether or not appellants before the Court of Appeals were creditors.

It is well settled that a finding is clearly erroneous under Rule 52(a) when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

United States v U. S. Gypsum Co., et al., 333 U. S. 364;

Grace Bros. v. Commissioner of Internal Rev. (9th Cir.), 173 F. 2d 170.

Questions Presented.

The questions presented by the record are incorrectly stated in the petition for a writ of certiorari. The important questions are:

1. May D. J. Miller, who was the Court's authorized and paid employee of the trustee in bankruptcy, become a purchaser of the assets of such bankruptcy estate?

2. Is such an employee, being a fiduciary both by virtue of his Court appointment and as an officer of the Court,

and as an officer and director of the insolvent bankrupt corporation, required to account to the bankruptcy estate for any profits realized through his purchase of the assets of such bankruptcy estate?

3. Did the petitioner, Paul Freedman, aid and abet and actively participate in Miller's acquisition of the estate's assets in fraud of the creditors and stockholders of the estate?

4. Is Freedman a bona fide purchaser?

5. Was the order of the Referee confirming the sale void, and if so, may it be set aside after the time for a review of the order confirming the void sale had expired?

Argument.

Miller was an officer of the Court, an employee of the trustee and a fiduciary. As such, he could not validly acquire the property of the trust, and the attempted sale to him is void.

It is too clear for argument that D. J. Miller became an officer of the Court by virtue of the Court's own order appointing him, and that he was likewise an employee and agent of the trustee, and remained such until after the order confirming the sale to him had been made.

While the Court of Appeals, in its opinion, refused to become involved over the question of whether or not a criminal statute had been violated, yet it bears repeating that the Court did say, after quoting from a finding of the Referee, that Miller:

> "was an agent and thus a fiduciary for hire of the Trustee and Referee to deal in the same property which was sold to him. It would be a contradiction of

the record for this Court to hold that Miller was not an agent of the Referee and Trustee under an appointment in effect at the time of the sale to him. This is not a question of fact, but a question of law upon the written documents and other uncontroverted facts recited by the Referee in his findings"

and again the Court says:

"It may be objected that Miller is thus brought within the policy of a statute which does not in name include him. But the only purpose of this quotation is to show that the Referee and the Trustee could not have performed these acts themselves. Therefore, they would also be liable, irrespective of good faith, if they permitted one of their sub-agents or employees to do any act which they themselves could not do. This is directly decided in the case of *Mosser v. Darrow,* 341 U. S. 267, 271-272."

While the Court of Appeals says, just before the above quotation, "The record does not show that he (Miller) demanded or was paid the stipulated salary of $100.00 per month," yet earlier in its opinion the Court says: "Miller filed a petition January 26, 1948, for compensation for services to the estate from June 6, 1947, to January 6, 1948, at $100.00 per month, and the next day the Referee authorized payment of $700.00 to Miller on account thereof" and in the last paragraph of its opinion the Court says: "He was paid compensation for his services in that regard." The first quotation was therefore obviously in error. [R. p. 85.]

The cases herein cited under the heading "JURISDICTION" all support the opinion of the United States Court of Appeals and we have looked diligently for decisions to the contrary and have found none.

Miller Cannot Legally Retain Any Profit, Large or Small, Resulting in the Purchase by Him of This Property, and the Bankruptcy Court May Require Him to Account to the Estate and Stockholders of the Corporation for Any Profit Realized.

In addition to the relief sought in the petition to have the sale set aside as void, the petition prays for an accounting to the Court for any profits realized.

The Court calls attention to four violations of their (Miller, Severseen and Vreeland) trust obligations as officers and fiduciaries of the corporation and its assets, the second one being "Refusing to hold the property purchased for the corporation, its stockholders and creditors." Miller is no more entitled to a profit from the sale of the property than is the trustee in bankruptcy.

The Referee, in preparing his certificate on review, and in his zealous efforts to uphold his order, said:

> "That it is the opinion and conclusion of myself as referee that the sale at all times was to Mr. Freedman and that D. J. Miller merely acted as an intermediary between the trustee and the said purchaser;" [R. p. 13]

and counsel for petitioner mentions and obviously stresses this statement.

If it were true that the sale at all times was to Freedman and that Miller merely acted as an intermediary between the trustee and Freedman, then why was it that the property traded by Freedman to Miller was not transferred to the trustee instead of permitting Miller to speculate with it to the detriment of the estate? Assuming there was no actual profit to Miller, the seven months delay in paying the trustee the sales price was a distinct detriment to creditors, even if the sale had been otherwise valid.

Although the Court Held That the Evidence Does Not Warrant a Finding of a Conspiracy as Charged, Yet There Is an Abundance of Undisputed Evidence to Show That Freedman Aided and Abetted Miller in His Fraudulent Scheme, and the Court of Appeals so Found.

The Court of Appeals has called attention to certain evidence which supports the above view. In its opinion denying Freedman's petition for a rehearing, the Court said:

> "It appearing to the Court that appellee Paul Freedman was found by the Court not to have been an innocent purchaser, but having been *an active participant in an official bankruptcy sale,* which was void of record because of the *participation of officers of the Court* in conjunction with Paul Freedman in the purported purchase of property in the custody of the Bankruptcy Court; and . . ." (Emphasis added.)

No doubt the Court had in mind the fact that Paul Freedman went far beyond the terms of his original contract in advancing Miller $100,000.00 cash to complete the sale [R. p. 154], instead of the $50,000.00 which he at first agreed to pay, as one of his participating acts in aiding an officer of the Court to acquire the property of the bankruptcy estate.

Another is the fact that he did not become an active bidder at the bankruptcy sale in opposition to Miller at a time when he was interested in acquiring the property.

Freedman clearly was not an innocent or bona fide purchaser and the Court of Appeals has so found from the

evidence. It is clear that the Court of Appeals has disagreed with the Referee's findings wherever they conflicted with the record supporting the allegations in the petition to set aside the void sale, excepting only the conspiracy allegation. The facts found by the Court of Appeals from the evidence and as related by it would, it seems to us, border close on the conspiracy alleged by the respondents.

The Court of Appeals (8th Cir.) in *Lawrence Warehouse Co. v. Twohig,* 224 F. 2d 493, at 498, said:

> "'A third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary,' Restatement, Restitution, § 138(2). Or, as Professor Scott puts it—'Where a person in a fiduciary relation to another violates his duty as fiduciary, a third party who participates in the violation of duty is liable to the beneficiary. If the third person makes a profit through such participation, he is chargeable as constructive trustee of the profit so made.' 3 Scott on Trusts § 506.
>
> "The term 'benefit', for purposes of restitution, denotes any form of advantage received, which is capable of having its value measured, and it accordingly includes the advantage of being saved from an expense or loss. Restatement, Restitution, § 1, Comment b. Any benefit received by one person as against another is entitled to be regarded as an unjust enrichment, 'if the circumstanees of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.' *Id.* § 1, Comment c."

The Order of the Referee Confirming the Sale to Miller Was and Is Void and of No Force or Effect and Can Be Set Aside at Any Time.

Miller was an officer of the Court. The undisputed facts clearly show this, and the Court of Appeals so found in both its original opinion and in its opinion denying the petition for a rehearing. All the cases we have cited hereinabove clearly support this view.

The Referee, in his certificate on review, comments upon "Laches of Petitioners" [R. p. 9], and counsel for petitioner here strongly urges this point and the long delay "with consequent disturbance to land titles."

Counsel well knows that the petitioner, Paul Freedman, remained the owner of this entire property while the petition to set aside the sale was pending, and that he sold the property to Purdy during the pendency of the appeal in the Court of Appeals. It is therefore difficult to understand what disturbance to land titles counsel refers to.

The Court of Appeals, in its opinion denying a rehearing expressed in positive language its view of the "bona fide purchaser" contention. It then also had before it the petition of the Bank of America, containing photostats of the deed from the trustee to Miller; from Miller to Freedman and from Freedman to Purdy, each deed showing the amount of revenue stamps and indicating the purchase price in each instance, also the date when Freedman parted with title. Yet counsel, with full knowledge of these facts, urges upon this Court that there were no profits made and that there was a disturbance of title to the property.

Were such a sale not contrary to public policy and absolutely void under the law, then the question of failure

to file a timely review might play an important part in the determination of the rights of respondents in this proceeding. But where the law is enacted for the protection of the general public, a violation thereof is contrary to public policy and void, and even the consent of creditors and the Court would not validate the transaction.

A petition to set aside the order of a void sale is proper regardless of the fact that the time for a review had expired. Alleged equities do not control the question of public policy, neither can the question of laches be raised.

In an effort to defend the order of sale, the Referee attempts to show that the sale to Miller was the highest bid, and for the best interest of creditors, but just as the Court said in the case of *In re V. Loewer's Gambrinus Brewery Co.*, 167 F. 2d 318 at 319, that stockholders, because of a matter of public policy, will not be heard to deny unfairness, so in this case, because of the matter of public policy, no one can be heard to deny unfairness. The sale was and is void whether the Court approved or disapproved.

Furthermore, the petition to set aside the sale as void was in the nature of a petition for rehearing. The record discloses there was no objection to the hearing before the Referee upon the ground that the time for a review had expired or that there was any subsequent transfer which might involve a disturbance to land titles.

The limitation of time prescribed by Section 39c of the Bankruptcy Act is binding only on the litigants and not upon the Courts. Equity always has the power to set side fraudulent sales and fraudulent judgments. It was held

by this Honorable Court in *Pfister v. Northern Illinois Finance Corporation,* 317 U. S. 144, 63 S. Ct. 133 at 137:

> "Where a petition for rehearing of a referee's order is permitted to be filed, after the expiration of the time for a petition for review, and during the pendency of the bankruptcy proceedings, as here, they may be acted on, that is, they may be granted 'before rights have vested on the faith of its action,' and the foundations of the original order may be reexamined. Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131, 137, 57 S. Ct. 382, 385, 81 L. Ed. 557. When such a petition for rehearing is granted and the issues of the original order are reexamined and an order is entered, either denying or allowing a change in the original order, the time for review under 39, sub. c, begins to run from that entry."

The California Supreme Court so appropriately said in *People v. Greene,* 74 Cal. 400 at 405:

> "A judgment which is void upon its face, and which requires only an inspection of the judgment roll to demonstrate its want of vitality, is a dead limb upon the judicial tree, which should be lopped off, if the power so to do exists. It can bear no fruit to the plaintiff, but is a constant menace to the defendant."

And later, this same Court said:

> "The power of a court to vacate a judgment or order void upon its face is not extinguished by lapse of time, but may be exercised whenever the matter is brought to the attention of the court. While a motion for such action on the part of the court is entirely appropriate, neither motion nor notice to an adverse party is essential. The court has full

power to take such action on its own motion and without any application on the part of any one. (Kriess v. Hotaling, 96 Cal. 617, 622.)"

People v. Davis, 143 Cal. 674, 675.

We respectfully submit that the Petition for a Writ of Certiorari does not present any reasons justifying the granting thereof, that it is without merit and should be denied.

Respectfully submitted,

BENJAMIN W. SHIPMAN,
Attorney for Respondents.

JOHN VAN AALST and
ERNEST R. UTLEY,
Of Counsel.

APPENDIX.

California Civil Code:

§2228. Trustee's Obligation to Good Faith. In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

§2229. Trustee Not to Use Property for His Own Profit. A trustee may not use or deal with the trust property for his own profit, or for any other purpose unconnected with the trust, in any manner.

§2231. Trustee's Influence Not to Be Used for His Advantage. A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.

§2233. To Disclose Adverse Interest. If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed.

§2234. Trustee Guilty of Fraud, When. Every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust.

§2235. Presumption Against Trustees. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by

the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.

§2236. [Trustee Mingling Trust Property With His Own.] A trustee who willfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance the absolute owner, is liable for its safety in all events, and for the value of its use.

§2237. Measure of Liability for Breach of Trust. A trustee who uses or disposes of the trust property, contrary to section two thousand two hundred and twenty-nine, may, at the option of the beneficiary, be required to account for all profits so made, or to pay the value of its use, and, if he has disposed thereof, to replace it, with its fruits, or to account for its proceeds with interest.

The California law which is in agreement with the uniform law on this subject is well stated in Perry on Trusts and Trustees. (Vol. 1, 7th Ed., Par. 433, at p. 721.) The learned author states that UNDER NO CIRCUMSTANCES can a trustee set up a claim to trust property adversely to the *cestui que trust,* and that under no circumstances could a trustee deny the title of the beneficiary.

In *Purdy v. Johnson,* 174 Cal. 521, the California Supreme Court ruled that a trustee cannot use trust property to secure repayment of advances made by him personally, since, such course of procedure, if permitted, would be in violation of his trust duties under the applicable code sections.

In *Saracco Tank Welding Co. v. Platz,* 65 Cal. App. 2d 506, the California Court stated as follows:

"When a corporation becomes insolvent its assets are held in trust for the benefit of the stockholders and creditors. In 15A Fletcher's Cyc. of Corp., perm. ed. (1938), section 7369, at page 59, it is said:

"The theory of the trust fund doctrine is that all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors. * * *"

See also:

Nixon v. Goodwin, 3 Cal. App. 358;

Title Insurance Co. v. Cal. Dev. Co., 171 Cal. 173;

Hanson v. Cheynske, 180 Cal. 275, 285.

TABLE OF AUTHORITIES CITED

Cases	PAGE
Bowman v. Lopereno, 311 U. S. 262	3
Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U. S. 131	3

Statute	
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IN THE

Supreme Court of the United States

October Term, 1955.

No. 403

PAUL FREEDMAN,

Petitioner,

vs.

DONOVAN & SCHUENKE, HORACE F. FRENCH, RALPH A. McCLURE and A. E. FRENCH,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY MEMORANDUM.

The Respondents' Brief addresses itself to peripheral matters only, and to improper arguments of evidence and fact foreclosed here, and avoids entirely the serious questions of policy and law affecting bankruptcy administration posed by the cause below and sought to be reviewed here on *certiorari*.

Untreated and unresponded to are the central and primary issues of the decision below, whether former officers of a corporate bankrupt are to be disqualified *in se* from bidding and purchasing at bankruptcy sales, the

companion question whether valuable and normal sources for bids and purchases are to be excluded in bankruptcy by extending mechanically the disability barring bids by Bankruptcy Court officers, and the Trustee, to ordinary and normal prospective purchasers interested in the estate who engage merely in *de minimus* acts of accommodation and service to the estate to save expenses, and, finally, whether in law and policy bankruptcy sales in any event can or should be upset upon such stated grounds years after their confirmation, in the face of the express bar of 11 U. S. C. 67(c), upon theory of being *void*, with consequent upsetting of the rights and interests even of BFP's.

Instead of responding to the above, respondents attempt to argue at length matters of evidence and to urge that the Referee should have found a disqualifying profit on the part of the purchaser-director below, D. J. Miller. This is urged in the teeth of the Referee's express conclusion on the facts that Miller suffered a *loss*, rather than making any gain [R. 13], and of the express acceptance of this conclusion of fact as binding and final by the Court of Appeals below (Slip Opinion, p. 5),* as well as by the District Court [R. 78]. *Certiorari* to this court is patently neither the time nor the place to reargue the facts.

The contention petitioner was lacking in standing to file the petition for rehearing below, or the petition for *certiorari* here, is without merit and overlooks the plain circumstance that petitioner was not a sole-party respon-

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*". . . the Referee has found that the price paid was adequate and that Miller, Seversen and Vreeland did not receive any profit on resale to Freedman. . . . these findings must be respected and the first ground of attack fails." (Slip Opinion, p. 5.)

dent below, guilty of failing to prosecute the true defense of an appeal, but rather was a secondary-party in interest below, for whom the briefs and defense of the Trustee in Bankruptcy sufficed fully in expression and coincided fully in interest at all stages prior to the adverse decision of the Court of Appeals below. At the point of that adverse decision the interests of petitioner and other second-party respondents below diverged from the Trustee in Bankruptcy, and petitioner and other parties like situated no longer were spoken for representatively by the Trustee. Thereupon petitioner took acts in his own behalf and directly, filing the petition for rehearing below, and the petition for *certiorari* here. This was but sensible and reasonable. Moreover, the Court of Appeals below passed upon the petition for rehearing upon its merits, denying the same on statement that petitioner was not situated as a BFP, thereby curing in any event any formal claims of defect in the petition. Even an untimely or otherwise formally defective petition, if within the jurisdiction of the court acting upon it, is cured of defects if passed upon on its merits and considered. (*Bowman v. Lopereno,* 311 U. S. 262, 266; *Wayne United Gas Co. v. Owens-Illinois Glass Co.,* 300 U. S. 131, 137-138.)

Wherefore, the petition for *certiorari* should issue.

Respectfully submitted,

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Of Counsel.